

UNITED STATES TAX COURT

WASHINGTON, DC 20217

AMAZON.COM, INC. & SUBSIDIARIES,)

Petitioner,)

v.)

COMMISSIONER OF INTERNAL REVENUE,)

Respondent.)

Docket No. 31197-12

ORDER REGARDING CONFIDENTIAL INFORMATION

On November 19, 2013, this Court issued a protective order adopting procedures to protect petitioner's trade secrets and proprietary technology (collectively, "Confidential Information") during the pre-trial phase of this case. On March 12, 2014, we amended the November 19 protective order to add operative provisions governing the production of source code and other highly sensitive technical information. This initial protective order has operated well to facilitate the efficient exchange of information during the discovery process.

The initial protective order applied only to the pre-trial phase of this case and anticipated that petitioner would "move the Court for a separate order governing all trial practice." On October 6, 2014, petitioner filed with the Court a Motion For Protective Order to cover the trial and post-trial phases of the case. This motion seeks to ensure that information designated as Confidential Information in the initial protective order continues to be protected during the later stages of this litigation.

The Motion for Protective Order is accompanied by affidavits from Scott R. Hayden, Vice President and Associate General Counsel for Intellectual Property at Amazon, and from Shelley L. Reynolds, Vice President, Worldwide Controller and Principal Accounting Officer for Amazon. These affidavits aver that Amazon maintains the highest level of protection for the Confidential Information; that

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certain Confidential Information has been licensed to third parties under confidentiality agreements barring disclosure of such Confidential Information; and that if Amazon's competitors gained access to Confidential Information about Amazon's financial results, business plans, product development, prospective lines of business, and performance metrics, they would gain a competitive advantage causing serious economic damage to Amazon and its shareholders.

Section 7458 of the Internal Revenue Code (Code or I.R.C.) provides that "[h]earings before the Tax Court and its divisions shall be open to the public." Section 7461(a) similarly provides that "all evidence received by the Tax Court and its divisions, including a transcript of the stenographic report of the hearings, shall be public records open to inspection by the public." An exception to these general rules is set forth in section 7461(b)(1), captioned "Trade Secrets or Other Confidential Information." It provides that the Court "may make any provision which is necessary to prevent the disclosure of trade secrets or other confidential information, including a provision that any document or information be placed under seal to be opened only as directed by the court."

Rule 103(a) of the Tax Court Rules implements these statutory provisions. It provides that, upon motion supported by good cause, "the Court may make any order which justice requires" to ensure that "a trade secret or other information not be disclosed or be disclosed only in a designated way." Rule 103(a)(7). Such an order may include directions that the parties file "specified documents or information enclosed in sealed envelopes" and that "written materials, after being sealed, be opened only by order of the Court." Rule 103(a)(6) & (8). Rule 103(a) resembles Rule 26(c)(1) of the Federal Rules of Civil Procedure, and this Court generally follows decisions interpreting that Rule when considering requests for protective orders. See Willie Nelson Music Co. v. Commissioner, 85 T.C. 914, 916-917 (1985). A protective order is appropriate where the material is the type of information that courts will protect and the requesting party shows good cause for protecting it. Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3rd Cir. 1984); Estate of Murphy v. Commissioner, T.C. Memo. 1990-346, 60 T.C.M. (CCH) 73, 75.

Petitioner's Motion for Protective Order does not request that the Court seal the entire trial or the entire trial record. Rather, the Motion proposes that specific documents or portions of documents, and specific testimony or portions of testi-

mony, will be sealed only to the extent necessary to prevent disclosure of Confidential Information. The Court and the parties have discussed this proposal in a series of telephone conferences, and petitioner has revised particular aspects of its proposal to address concerns expressed by respondent and the Court. Respondent's Notice of Objection to Motion for Protective Order, filed October 20, 2014, does not take issue with any specific provision of petitioner's proposed order. Instead, respondent contends that petitioner has not shown "good cause" for entry of any protective order at all.

We disagree with the latter submission. Petitioner has established by affidavit the common-sense proposition that disclosure of its Confidential Information would damage Amazon and its shareholders by revealing "trade secrets and other confidential information." I.R.C. § 7461(b)(1). Petitioner has thus met its burden of showing "good cause" under Rule 103(a). On numerous prior occasions, this Court has issued protective orders to ensure the confidentiality of proprietary business information and intellectual property that has been the subject of section 482 transfer pricing disputes. See, e.g., Veritas Software Corp. & Subs. v. Commissioner, 133 T.C. 297, docket No. 12075-06 (2009) (entire record sealed); GlaxoSmithKline Holdings (Americas) Inc. & Subs. v. Commissioner, T.C. docket No. 5750-04 (trade secrets sealed); DHL Corp. & Subs. v. Commissioner, T.C. Memo. 1998-461, docket No. 19570-95 (entire record sealed); Seagate Tech. Inc. v. Commissioner, 102 T.C. 149, docket No. 11660-90 (1994) (trade secrets sealed).

It is the goal of this Court to provide as robust a public record as possible while protecting petitioner's Confidential Information. We are satisfied that the terms of the protective order set forth below will enable the largest possible percentage of the trial record to be made available for ultimate public inspection, consistently with the protection of Amazon's proprietary business and technological information. In light of the foregoing, it is hereby

ORDERED that petitioner's Motion for Protective Order filed October 6, 2014, is granted in that the following terms and conditions shall govern the treatment of Confidential Information during the Special Trial Sessions of this Court scheduled for October 24, 2014, in Washington, D.C., for November 3-26, 2014, in Seattle, Washington, for December 15-23, 2014, in Seattle, Washington, and during post-trial proceedings:

1. For purposes of this Order (Trial Protective Order), “Confidential Information” is defined to include the following information, all of which shall constitute Protected Information under this Trial Protective Order:
 - a. All personally identifying information related to each person or entity having an account with any web site operated by Amazon.com, Inc. or its affiliates including, without limitation the name, e-mail address, address, phone number, and other information with respect to such person or entity;
 - b. All information required to be kept confidential by any law or regulation of any government;
 - c. Agreements and the terms of any such agreements between petitioner or respondent (each a party and collectively the parties) and any third party that contain confidentiality provisions prohibiting disclosure of the agreements or their terms, except to the extent that all applicable consents permitting disclosure are provided;
 - d. Business analyses, results, data, and reporting information less than five years old or otherwise still in use for business purposes at the time such material is designated as Protected Information, including:
 - i. Valuations of tangible and intangible property,
 - ii. Pricing analyses,
 - iii. Analyses of petitioner’s competitors,
 - iv. Analyses of petitioner’s customers,
 - v. Analyses of potential acquisitions,
 - vi. Analyses of market environments,
 - vii. Analyses of potential new categories and product lines, and
 - viii. Analyses of other business opportunities;
 - e. Financial analyses, results, data, reporting information, plans and projections, including:
 - i. Financial results segmented by business line (*e.g.*, M.com, Marketplace, Amazon Web Services, etc.),
 - ii. Financial results segmented by product category,
 - iii. Financial results segmented by product line,

- iv. Financial results segmented by entity,
- v. Financial results segmented by cost center,
- vi. Financial results segmented by geographic location,
- vii. Budgets,
- viii. Revenue estimates,
- ix. Cost/expense estimates, and
- x. Sales estimates;
- f. Forward-looking strategic plans less than ten years old or otherwise still in use for business purposes at the time such material is designated as Protected Information, including:
 - i. Business plans,
 - ii. Analyses of potential acquisitions,
 - iii. Pricing initiatives,
 - iv. Marketing strategies,
 - v. New product initiatives,
 - vi. OP1s,
 - vii. OP2s,
 - viii. NP1s,
 - ix. Multiyear plans,
 - x. Offsite documents, and
 - xi. Board presentations;
- g. Petitioner's other non-public technical materials, such as computer code and associated comments and revision histories, pricing and other technical mechanisms and algorithms, database schema and content, architecture documents, inventions, prototypes, related technical and functional documents, application program interfaces, and non-public drafts of such materials;
- h. Petitioner's non-public trademark, trade dress, and copyright applications, supporting materials, and related correspondence and briefing;
- i. Petitioner's non-public patent applications, supporting materials, and related correspondence and briefing;
- j. Any information that is a trade secret at the time of production; and
- k. Any information agreed by the parties or, absent agreement, determined by the Court to constitute Confidential Information.

2. Confidential Information does not include information that is already lawfully in the public domain, or that is made publicly available by, or with the consent of, the designating party.
3. Confidential Information designated as protected information by a party pursuant to the terms of this Court's Order Regarding Protected Information dated November 19, 2013 (Pretrial Protective Order), shall be Protected Information for purposes of this Trial Protective Order. However, Confidential Information in the trial record of this case shall be subject to seal or redaction as Protected Information as set forth in paragraphs 7, 8, and 9 of this Trial Protective Order.
4. For purposes of this Trial Protective Order, reproductions of, extracts of, and summaries of Protected Information shall be Protected Information to the same extent as the Protected Information to which such reproductions, extracts, or summaries relate.
5. Information originally designated as Protected Information shall not retain that status after any Order of this Court denying it such status.
6. All provisions of the Pretrial Protective Order governing disclosure of Protected Information other than as evidence at trial shall continue in effect.
7. Trial Evidence - Expert Witness Testimony.
 - a. On or before Wednesday, October 22, 2014, petitioner shall submit to respondent a version of the parties' expert witness reports and deposition transcripts showing petitioner's proposed redactions of Protected Information and separate versions with the redacted information removed.
 - b. At any subsequent date that is mutually agreed, or otherwise established by the Court, respondent may challenge petitioner's confidentiality designations and seek the inclusion of additional information in the version of the report or deposition transcript for inclusion in the public record of the trial.
 - c. When the final redactions have been determined by the parties or the Court, the expert witness reports (or deposition

testimony) as finally redacted shall be provided to the Court, and such redacted versions shall replace any prior redacted version of such report or deposition in the publicly available trial record.

- d. The parties will coordinate with the Court regarding the most efficient method of protecting the confidentiality of the Protected Information during the examination or cross-examination of experts, including the use of redacted portions of expert depositions.
- e. In the event that the courtroom is closed during expert witness testimony to persons other than those affiliated with the Court or on the parties' courtroom inclusion lists (as set forth in paragraph 8(a), below), on or before the Monday following each week during which expert witness testimony is taken, petitioner shall submit to respondent and the Court a version of the transcript of such expert testimony that is redacted to exclude Protected Information.
- f. Respondent may challenge petitioner's redactions under paragraph 7(e), at any time after receipt of each redacted transcript, with an appropriate filing with the Court. Any redacted information thereafter deemed non-confidential by the Court, after hearing arguments of the parties, shall become part of the publicly available record of the trial. If respondent does not challenge petitioner's redactions by a date to be established by the Court, petitioner's version of the redacted transcript shall become part of the publicly available record of the trial.

8. Trial Evidence - Fact Testimony.

- a. Current employees of respondent and petitioner shall have unrestricted access to the courtroom during trial sessions, except to the extent excluded under Tax Court Rule 145. Respondent and petitioner shall each transmit to the Court a list of attorneys, legal assistants, expert witnesses and support staff, and fact witnesses not otherwise excluded (and, if applicable, their separate attorneys) who shall have access to the courtroom during trial sessions.

- i. For the testimony of Mr. Brian Valentine during the trial session scheduled for October 24, 2014, such lists shall be transmitted by Monday, October 20, 2014.
 - ii. For the testimony of fact witnesses during the trial sessions scheduled for November 3-26 and December 15-23, such lists shall be transmitted by Monday, October 27, 2014.
 - b. Attorneys (other than petitioner's and respondent's counsel) for fact witnesses shall only be permitted in the courtroom for the portion of the trial during which their client is providing testimony.
 - c. Persons not on the parties' lists (or persons not otherwise affiliated with the Court) shall not be permitted in the courtroom during fact testimony at trial unless otherwise directed by the Court. Petitioner shall have the primary responsibility to assure compliance with this paragraph.
 - d. On or before the Monday following each week of fact testimony, including the special trial session on October 24, 2014, petitioner shall submit to respondent and the Court a version of the prior week's transcript excluding testimony redacted as Protected Information.
 - e. Respondent may challenge petitioner's redactions under paragraph 8(d), at any time after receipt of each redacted transcript, with an appropriate filing with the Court. Any redacted information thereafter deemed non-confidential by the Court, after hearing arguments of the parties, shall become part of the publicly available record of the trial. If respondent does not challenge petitioner's redactions by a date to be established by the Court, petitioner's version of the redacted transcript shall become part of the publicly available record of the trial.
9. Trial Evidence - Exhibits. On or before Wednesday, October 22, 2014, petitioner shall notify respondent and the Court of any stipulated exhibits or party exhibits listed in the exhibit lists exchanged on October 17, 2014 that are required to be placed under seal because they contain Protected Information. Respondent may challenge petitioner's designations at any time

after such notification with an appropriate filing with the Court. Sealed exhibits shall be physically segregated from other trial exhibits and identified in a manner that distinguishes them from those other exhibits. Sealed exhibits shall remain under seal unless thereafter the Court requires them to be unsealed or made available with appropriate redactions, after hearing arguments of the parties.

10. Sharing of Protected Information. Without prior leave of the Court, neither party may share Protected Information (including un-redacted trial transcripts, un-redacted expert witness reports, and sealed exhibits) with any persons not included on the parties' lists in paragraph 8(a), except that current employees of respondent and petitioner shall have unrestricted access to Protected Information.
11. Pretrial, Trial, and Post-trial Filings. Material previously designated as Protected Information may be included in, or attached to, filings with the Court before, during or after trial, but only in accordance with this Order. The Court will consider at the close of the trial appropriate procedures to provide for the continued protection of Protected Information in the post-trial briefing process.
12. To the extent respondent challenges petitioner's redactions under any provision of this Order, unless otherwise ordered by the Court the burden rests on petitioner to establish that the information is Confidential Information and to demonstrate that protection is warranted. Information designated as Protected Information will be treated as such during the resolution of the dispute.
13. Unless otherwise ordered by the Court or agreed by the parties, the provisions of the amendment to the Pretrial Protective Order, dated March 12, 2014 (Clean Room Provisions), shall remain in full force and effect during trial and be subject to the further protections of this Trial Protective Order.

14. Nothing in this Trial Protective Order, or anything done in compliance with this Trial Protective Order, constitutes a waiver by either party of the confidentiality of any information or document subject hereto.
15. Within 90 days after the final termination of this action pursuant to I.R.C. § 7481, all documents designated as Protected Information, including extracts or summaries thereof, and all reproductions thereof, shall be returned to the disclosing party or shall be destroyed, with the following exceptions: copies of papers submitted to the Court (including exhibits); the un-redacted portions of deposition, hearing, or trial transcripts; and one copy of documents and things produced by the parties or non-parties in this case, which may be retained by trial counsel. If materials are destroyed, trial counsel shall within 120 days after the final termination of this action, as defined in I.R.C. § 7481, certify to opposing trial counsel that destruction has taken place.
16. Unless otherwise ordered by the Court, Protected Information shall remain under seal and shall not become part of the record of this case available to the public.
17. Except as specifically provided herein, the terms, conditions, and limitations of this Trial Protective Order shall survive the termination of this action. The Court retains jurisdiction over the parties and other persons governed by this Trial Protective Order for purposes of modifying this Trial Protective Order or adjudicating any dispute regarding the improper use or disclosure of Protected Information disclosed under the protections of this Trial Protective Order.

18. Nothing herein shall preclude the parties from bringing a proceeding in another administrative or judicial forum seeking redress for the unwarranted disclosure of Protected Information, or deprive such administrative or judicial forum of jurisdiction over such proceeding.

**(Signed) Albert G. Lauber
Judge**

Dated: Washington, D.C.
October 20, 2014